McDonald's USA, LLC, A Joint Employer, et al. ***and*** **Fast Food Workers Committee and Service Employees International Union, CTW, CLC, et al.** Cases 02–CA–093893, et al., 04–CA–125567, et al., 13–CA–106490, et al., 20–CA–132103, et al., 25–CA–114819, et al., 31–CA–127447, et al.

January 8, 2016

ORDER[1]

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The requests for special permission to appeal the attached February 20, 2015 Order of Administrative Law Judge Lauren Esposito denying the Motions to Sever the above consolidated cases, filed by McDonald's USA, LLC ("McDonald's") and the New York Franchisees ("Franchisees"; collectively, "Respondents"), are granted. On the merits, the appeals are denied. The Respondents have failed to establish that the judge abused her discretion in denying the Motions to Sever.

By orders dated January 5 and 6, 2015, the General Counsel consolidated six separate complaints alleging that McDonald's constitutes a joint employer with the individual Franchisees and that McDonald's and the Franchisees, as joint employers, violated Section 8(a)(1) and (3) of the Act.[2] McDonald's and the Franchisees filed Motions to Sever, arguing that the General Counsel abused his discretion in consolidating the cases. The judge denied the motions, finding that the General Counsel's decision to consolidate the complaints was not an arbitrary abuse of his discretion. McDonald's and the Franchisees then filed the instant requests for special permission to appeal.[3]

The Respondents have not met the heavy burden of establishing that the judge abused her discretion in denying the Motions to Sever. The judge carefully evaluated and weighed the Respondents' arguments concerning potential issues that could arise as a result of consolidation and concluded that the General Counsel's decision to consolidate was within his authority under the Board's Rules and Regulations and applicable case precedent.

Moreover, we agree with the judge, for the reasons she stated, that the General Counsel did not abuse his discretion by consolidating the cases. As explained by the judge, the General Counsel has wide discretion in deciding whether to consolidate proceedings.[4] Although that discretion is not unbounded, generally the General Counsel "may do as he thinks best," and his decision about whether or not to consolidate is subject to review only for "arbitrary abuse of discretion." *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 774 (1997).

Applying this standard of review, we do not agree with our dissenting colleague that the General Counsel acted arbitrarily by consolidating the complaints at issue here. The General Counsel has provided a reasoned basis for his decision to consolidate. Namely, the bulk of the evidence he intends to present in support of the complaint allegations that McDonald's is a joint employer of its franchisees' employees applies on a corporate, nationwide basis and is therefore applicable to all franchisees.[5] Given the commonality of the evidence he intends to present, the General Counsel has elected to have one proceeding that will result in a single decision in which the judge makes all of her findings on McDonald's joint-employer status with each franchisee, as well as on the merits of each unfair labor practice allegation.[6] All of the judge's rulings, findings, and conclusions in this single proceeding can then be reviewed by the Board and, if further appealed, by one court of appeals.

Our dissenting colleague argues that this structure will impose greater costs and delays for the Board, the parties, and any subsequent reviewing court, or courts, than if the alleged violations were litigated in proceedings

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The complaints allege that the 32 named respondents committed a total of 181 violations of the Act.

[3] McDonald's and the Franchisees request severance of 22 separate cases to be tried before administrative law judges in the regions where the charges were filed.

[4] Sec. 102.33 of the Board's Rules and Regulations provides that the General Counsel may transfer and/or consolidate charges and proceedings whenever the General Counsel "deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay."

[5] Sec. 3(d) of the Act gives the GC "final authority . . . in respect of the prosecution of such complaints before the Board . . . ." The General Counsel controls the theory of the case and is the only party in a position to determine that the evidence he will present to establish McDonald's joint-employer status is applicable to all of the respondents in the consolidated complaint.

[6] Our dissenting colleague argues that the "central question" should be identifying whether any unfair labor practices have been committed and that consolidating the cases improperly gives precedence to who is liable for violations over whether there were any violations at all. As discussed more fully in our Order denying McDonald's request to review the judge's Case Management Order, it is neither unusual nor controversial for the judge to hear evidence on joint-employer status during the same hearing where evidence on the merits of the alleged unfair labor practices is also presented, and the judge did not abuse her discretion in determining the order of evidence to be presented in this case. See 363 NLRB No. 92 (2016).

limited to each franchisee-respondent, as urged by the Respondents. We question this assumption.

Under the approach urged by McDonald's and the Franchisees, and endorsed by our colleague, 22 hearings would be held by administrative law judges (where, according to the General Counsel, much of the same evidence would be introduced to support his joint-employer allegation). Each judge would then issue a decision on the merits of the joint-employer allegation as well as the unfair labor practice allegation. Having multiple judges determine joint-employer status raises the potential for conflicting analyses and findings, in spite of the same, or substantially the same, evidence. Further, after each of the judges has issued his or her decision in one of the 22 proceedings, the General Counsel, the Charging Parties, or the Respondents could file exceptions with the Board, leading to the potential for the Board to be asked to review 22 joint-employer determinations for correctness and consistency, and creating the potential for litigation in multiple courts of appeals and conflicting decisions from different circuit courts. The General Counsel's approach, by contrast, requires one hearing and one judge's decision. The Board would be asked to review only one judge's findings, and the Board's decision would lead to one single court ruling.

Whether the General Counsel's approach or McDonald's approach would ultimately be the most efficient in terms of time and costs is highly speculative, and we are not called upon to determine which approach is the better one. As discussed above, the Board's Rules and Regulations allow the General Counsel to consolidate proceedings. We agree with the judge that the General Counsel's consolidation of the proceedings here and decision to move forward before one administrative law judge is not arbitrary and does not exceed his authority under the Act. Accordingly, the judge did not abuse her discretion in denying the Motions to Sever.

We also agree with the judge that many of the concerns expressed by McDonald's and the Franchisees can be ameliorated through case management. In our Order ruling on McDonald's and the Franchisees' requests for special permission to appeal the judge's March 3, 2015 Case Management Order, also issued today, we have found that the judge's order provides for an orderly presentation of evidence and was not an abuse of her discretion. See 363 NLRB No. 92 (2016). In this regard, the Case Management Order provides for a distinct component of the litigation as it relates to each individual franchisee, which helps to protect the Respondents' confidentiality and due process rights, as well as controlling the efficiency and costs of litigation for those individual businesses. Id.

Dated, Washington, D.C., January 8, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

This case involves an unprecedented consolidation of 61 unfair labor practice charges filed in six NLRB Regions (Regions 2, 4, 13, 20, 25 and 31) against 31 employers[1] involving 181 alleged violations at 30 different restaurant locations. Nine violations are alleged to have been committed by McDonald's Restaurants of Illinois, Inc.; the other 172 alleged violations are alleged to have been committed by one of the 30 franchisee-respondents operating a McDonald's franchise restaurant. And McDonald's USA, LLC (McDonald's USA) is alleged to exercise sufficient control over the franchisee-respondents to qualify as an additional responsible "employer" based on the Board's joint-employer doctrine. The franchisee-respondents are independent of one another, and the General Counsel has indicated that "McDonald's—the alleged joint employer—is not accused of committing any ULPs in this proceeding."[2] Therefore, each of the alleged violations turns on what happened to *particular* employees at a *particular* location operated by *one* of 31 respondents.

At present, the merits of the alleged violations have not been decided. Instead, we must determine whether the structure of this consolidated case is appropriate. The current proceeding is not merely a consolidated case, it is a mega-consolidation resulting from combining already-consolidated cases. The litigation started as 61 separate charges filed in six NLRB Regions against 31 different respondents. The General Counsel then issued six consolidated complaints, each consolidating multiple cases: 17 cases in Region 2; 3 cases in Region 4; 22 cases in Region 13; 4 cases in Region 20; 4 cases in Region 25;

[1] There are 32 respondents, including McDonald's USA, LLC. Of these, 30 are franchisees operating a McDonald's franchise restaurant. The remaining respondent is McDonald's Restaurants of Illinois, Inc., which is not alleged to be a franchisee of or a joint employer with McDonald's USA, LLC.

[2] General Counsel's Opposition to the New York Franchisees' Requests for Special Permission to Appeal the ALJ's Order Denying Their Motions to Sever and Portions of Her Case Management Order, p. 3 (dated April 9, 2015).

and 11 cases in Region 31. The consolidated complaints from Regions 4, 13, 20, 25 and 31—encompassing 44 cases—were then transferred to Region 2, which had its own 17-case consolidated complaint, and the General Counsel then elected to consolidate everything into the current massive proceeding before a single judge. Obviously, such a multiple-consolidated case involves tradeoffs. It might save money and time to the extent that certain common facts and legal theories will need to be litigated and decided only once, without the duplication and delay associated with separate cases. On the other hand, this consolidation of claims against separate respondents—with each participating in litigation involving claims against all *other* respondents—could result in greater expense and delay than would result from separate, individual cases. The Board must also be guided by fundamental principles of fairness and our overriding interest in effectuating the policies and purposes of the National Labor Relations Act (NLRA or Act).

I have no doubt that my colleagues and the judge, like the General Counsel, sincerely believe the pursuit of this massive consolidated proceeding will effectuate the purposes of the Act and reduce certain costs and delays. However, even applying a very lenient abuse-of-discretion standard, I have concluded their reasoning is contradicted by nearly everything associated with the Board's own experience litigating these types of cases, especially those involving alleged joint-employer status, and even by the short history of this litigation itself. It appears clear that this mega-consolidation will not reduce costs and delays. Rather, it will create greater costs and delays for everyone: the Board, the respondents, the charging parties, and any reviewing courts. Even worse is the very substantial risk that this gargantuan consolidation of parties and claims has already prompted the judge and the Board to adopt case management procedures that include shortcuts and irregularities that may undermine fundamental principles of fairness, create the appearance of unfairness, and/or become an independent basis for having everything overturned, many years from now, on appeal.

The Board does important work enforcing a statute that creates important rights and obligations for employees, unions and employers throughout the country. In this case, the General Counsel and his hard-working attorneys are endeavoring to give force and effect to our statute's provisions. I respect and commend their work. Without their efforts, the Act would be an empty vessel that would poorly serve parties who should benefit from every ounce of protection available under our statute. However, the Board also has an eventful and unfortunate history, especially over the past 10 years, which has demonstrated the high cost of having to relitigate hundreds of cases for reasons unrelated to their merits.[3]

This mega-consolidated litigation places the Board at another critical juncture. The consolidation itself, which has no parallel in the Board's history, will unquestionably detract from the merits, unnecessarily complicate the manner in which evidence can be taken, and potentially require everything to be undone or re-done many years from now. In my view, the alleged violations should be litigated in proceedings limited to each franchisee-respondent—including consolidated proceedings, where multiple charges have been filed against particular franchisees—using the Board's conventional procedures that have been refined by 80 years of experience. For this reason, as explained in the remainder of this opinion, I would grant the motions to sever.

DISCUSSION

The Board's Rules and Regulations provide that a hearing is "usually conducted in the Region where the charge originated," but it may be held elsewhere in "extraordinary situations."[4] The General Counsel may also consolidate a charge or complaint "with any other proceeding" when he "deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay."[5] The General Counsel has "wide discretion" to consolidate multiple charges or complaints, but his discretion is "not unbounded." *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 774 (1997).

I support the General Counsel's "wide discretion" to consolidate charges and complaints. However, for the reasons explained below, I believe the Board, the judge and the General Counsel, though armed with the best intentions, have wrongly concluded that the present consolidated litigation is appropriate.

First, I believe the massive consolidation of these divergent parties and claims in a single proceeding, far from avoiding unnecessary costs or delay, will inescapably impose overwhelming burdens and much greater costs *and* delays on the Board, the parties and any subsequent reviewing court or courts. Literally nothing in the Board's history resembles this litigation in nature and

[3] See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (invalidating Board decisions issued during period in which there were only two sitting Board members); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (invalidating Board decisions where quorum was dependent on recess appointments made when Senate was found not to have been in recess); *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015) (invalidating Board decision where complaint was issued by Acting General Counsel during period when his appointment was invalid under the Federal Vacancies Reform Act of 1998).

[4] NLRB Rules and Regulations (Rules) Sec. 101.10.

[5] Rules Sec. 102.33(a)(2), (3).

extent, but another joint-employer case provides an important frame of reference. In *CNN America, Inc.*, 361 NLRB No. 47 (2014), the Board decided a far simpler and more conventional set of joint-employer issues involving two locations and three entities (CNN and two vendors, with CNN alleged to be a "joint employer" of technical employees supplied by the vendors). Notwithstanding its relative simplicity compared to this proceeding, the *CNN* case required 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains unresolved because of a pending court appeal. If the Board's finding that CNN was liable as a joint employer survives appellate review, remedial issues will require further Board compliance proceedings. Vast as it was (and still is), *CNN America* is next to nothing compared to this proceeding, which involves 30 times the number of charges, 15 times the number of locations, and 10 times the number of respondents. The sheer size of the current litigation, standing alone, militates against it. In its present form, this mega-consolidated proceeding will predictably resemble Charles Dickens' fictional lawsuit *Jarndyce and Jarndyce*, which was "so complicated that no man alive knows what it means," and where "[t]he little plaintiff or defendant who was promised a new rocking-horse when *Jarndyce and Jarndyce* should be settled has grown up . . . and trotted away into the other world."[7]

Second, I believe the rationale for consolidating all these diverse parties and claims—the suggestion that this will save time and money—fails to withstand scrutiny. Like my colleagues, I do not prejudge what may ultimately be proven. However, the alleged violations in the instant case involve employees working for 30 franchisee-respondents at 30 different locations. Substantial effort is required merely to identify the particular parties, locations, and alleged violations at issue in this case, which I have set forth in the Appendix to this opinion. Each of the alleged violations must be separately examined and evaluated. Moreover, as vividly illustrated by the *CNN* case, the Board similarly requires a detailed, fact-specific evaluation of joint-employer allegations, an evaluation that will have to be undertaken regarding McDonald's USA and *each* franchisee-respondent separately.[8] The mega-consolidation of claims and parties does not avoid the cost and delay associated with detailed scrutiny of these matters; to the contrary, substantial *additional* cost and delay is likely to result from the need to litigate these matters sequentially, in a single proceeding before a single judge.

[7] Charles Dickens, *Bleak House* (1853). The delay associated with litigating an enormous consolidated case is most damaging when it comes to fast food employees because those positions involve extremely high turnover, with estimated annual turnover rates ranging from 47 to 62.7 percent, suggesting that the average length of employment for a fast food employee is roughly two years. See Rosemary Batt, Jae Eun Lee and Tashlin Lakhani, A National Study of Human Resources Practices, Turnover, and Customer Service in the Restaurant Industry 17–18 (2014) (reporting annual turnover rates for fast food employees as 47% total, 53% for front-of-house employees, and 42% for back-of-house employees, with the Bureau of Labor Statistics reporting a 62.7% total annual turnover rate for employees in the hospitality industry) (http://rocunited.org/wp-content/uploads/2014/01/HRPTCS_Cornell_Report_4.pdf). This makes it all but certain that none of the employees affected by the alleged violations in the consolidated proceeding will even be employed by a McDonald's franchisee whenever the current litigation might end many years from now.

[8] A multitude of Board and court cases recognize the need for an individualized, fact-specific inquiry when deciding joint-employer, single-employer and related issues that involve alleged shared liability across multiple entities. See, e.g., *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964) (whether an entity possesses sufficient indicia of control to be an employer is "essentially a factual issue"); *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (analyzing the joint-employer issue based on the "specific facts of this particular case"); *W. W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 247 (7th Cir. 1988) ("Whether two separate entities exert sufficient control over one group of employees to be treated as joint employers for purposes of the NLRA, is a factual question . . . ."); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 fn. 1 (6th Cir. 1985) ("[B]ecause the joint employer issue is simply a factual determination, a slight difference between two cases might tilt a case toward a finding of joint employment."); *North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382–1383 (5th Cir. 1980) ("[M]inor differences in the underlying facts might justify different findings on the joint employer issue . . . ."), cert. denied 449 U.S. 899 (1980); *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 16 (2015) (to determine joint-employer status, "all of the incidents of the relationship must be assessed," and the determination must be "based on a full assessment of the facts") (internal quotation marks omitted); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (2014) ("[T]he 'relevant facts involved in this determination [of joint-employer status] extend to nearly every aspect of employees' terms and conditions of employment and must be given weight commensurate with their significance to employees' work life.'") (quoting *Aldworth Co.*, 338 NLRB 137, 139 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004)); *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995) ("The determination of whether two entities are joint employers 'is essentially a factual issue.'") (quoting *Boire v. Greyhound Corp.*, supra, 376 U.S. at 481); *Southern California Gas Co.*, 302 NLRB 456, 461 (1991) ("Primarily, the question of joint-employer status must be decided on the totality of the facts of the particular case."); *Pacific Mutual Door Co.*, 278 NLRB 854, 858–859 fn. 18 (1986) ("[T]he issue of joint-employer status is a factual one."); *Three Sisters Sportswear Co.*, 312 NLRB 853, 861 (1993) ("Single employer status depends on all the circumstances of a particular case."), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995); *Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984) ("[I]n determining whether two factually separate employers are in fact alter egos … each case must turn on its own facts."), enfd. as modified 748 F.2d 1001 (5th Cir. 1984). The General Counsel intends to litigate the joint-employer issue under *two* standards, the Board's traditional standard—i.e., the standard the Board applied prior to *BFI*, supra—and a more expansive standard.

Third, this mega-consolidation puts the cart before the horse by making the issue of "who is liable for violations of the Act" take precedence over whether any violations were committed in the first place. Notwithstanding the diverse parties and claims having little or no connection with one another that are assembled together here, the judge concluded that this enormous consolidated proceeding is appropriate based on "the overarching nature of the General Counsel's theories," which relate to the allegation that McDonald's USA "is a joint employer with the franchisee Respondents," based on "agreements, policies, and business practices which apply throughout the country." I find this rationale unpersuasive, even assuming that the General Counsel will present such evidence. For starters, as noted above, the alleged violations either will be found to have occurred or will be dismissed, based on what actually happened to particular employees who work for particular franchisee-respondents at particular locations. Before one gets to the "overarching nature" of the General Counsel's joint-employer theories, the central question should be whether *any* employer committed one or more of the 181 alleged violations encompassed within the 61 charges that were investigated by six different NLRB Regions; and in connection with any proven violation, the Board's overriding interest should be to ensure the *affected employee* obtains meaningful relief. To take just one example, the General Counsel alleges that the work hours of employee John Smith[9] were reduced on March 28, 2013, at a Chicago restaurant owned and operated by Karavites Restaurants 26, Inc., allegedly in violation of Section 8(a)(3) and (1) of the Act, because Smith engaged in union activities by assisting the Workers Organizing Committee of Chicago, a labor organization.[10] If the allegation proves meritorious, the present mega-consolidated proceeding will unquestionably cause years of *additional* delay and impose much greater costs on parties having nothing to do with employee Smith's employment before Smith receives any remedy, in comparison with greatly reduced delays and costs that would predictably result from handling this claim in a more conventional way.[11]

Fourth, even if one focuses on the joint-employer issue, the type of evidence promised by the General Counsel does not justify making 30 franchisee-respondents parties to the same proceeding, nor does it justify holding hostage to one another the diverse claims of and potential remedies pertaining to employees at 30 unconnected locations across the country. Even assuming McDonald's USA maintained "agreements [and] policies" and engaged in "business practices which apply throughout the country," it is hard to imagine that such evidence would predominate over the highly detailed evidence needed to prove the 181 different alleged violations described above. Moreover, even as to the joint-employer issue, the structure of this litigation should take into account more than what the General Counsel hopes to prove (i.e., what the judge describes as "the overarching nature of the General Counsel's theories"). The Board also has an obligation to consider what will be entailed in *deciding* and, potentially, *remedying* the alleged unfair labor practices in dispute. Unlike the courts, the Board does not recognize any procedures permitting class or collective actions, for example, which avoid the need to adjudicate each and every individual claim. However, even where class-action claims are permitted, the Supreme Court has emphasized that the potential aggregation of claims and parties should turn on what is needed to provide *answers*, rather than merely focusing on "common questions." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("What matters. . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. *Dissimilarities . . . are what have the potential to impede the generation of common answers*.") (internal quotation marks omitted; emphasis added and in original). Consequently, rather than being based primarily on what the General Counsel hopes to prove, the structure of this litigation must also accommodate the possibility—indeed, the likelihood—that each of the 30 franchisee-respondents may introduce detailed evidence focusing on day-to-day differences between the General Counsel's "overarching theories" and the facts on the ground, including exceptions and explanations regarding the relationship between McDonald's USA and each franchisee-respondent, in addition to the facts pertaining to each alleged violation. In this calculus, it appears likely that evidence regarding any McDonald's USA "agreements, policies, and business practices," to the extent they are uniform, would be much more straightforward, perhaps consisting primarily of

[9] "John Smith" is not the employee's real name. I am using a pseudonym consistent with the Agency's policy of not publicly disclosing the names of alleged discriminatees prior to the unfair labor practice hearing. See General Counsel Memorandum 15-07 (Aug. 12, 2015).

[10] See *Karavites Restaurants 26, Inc. et al*., Case 13–CA–106491, which is one of 22 cases encompassed by a consolidated complaint issued by Peter Sung Ohr, Regional Director of NLRB Region 13. Order Consolidating Cases, Consolidated Complaint, and Notice Of Hearing ¶¶ 24–27 (Dec. 19, 2014).

[11] As noted in fn. 7 supra, the high industry turnover rates suggest that fast food employees will be employed, on average, for roughly two years. I believe this factor by itself militates strongly against the instant consolidation, which predictably will cause substantially more delay in the resolution of claims than would result from conventional single-case litigation or the consolidation of a more limited number of cases.

documentary evidence, than the evidence presented by 30 franchisee-respondents regarding the particular facts of each alleged violation and alleged dissimilarities between those nationwide "agreements, policies, and business practices" and the actualities of each franchisee's specific relationship with McDonald's USA in an effort to undermine the General Counsel's "overarching" theories.[12]

Fifth, I believe the aggregation of unconnected parties and claims in this consolidated litigation will unavoidably prejudice the respondents and deny them due process. Conversely, the same consolidation will inherently benefit the General Counsel to the detriment of all other parties, including, in all likelihood, the employees whose claims are being adjudicated. Preliminarily, there is a troubling circularity to the rationale supporting consolidation. The General Counsel *hopes to prove* that one entity—McDonald's USA—is a "joint employer" in its dealings with each of 30 franchisee-respondents, and this not-yet-proven contention is the premise for aggregating 181 dissimilar claims and 31 respondents—the 30 franchisees plus McDonald's Restaurants of Illinois, Inc.—that have no relationship with one another except for the fact that they operate McDonald's restaurants. But the fact that each of the franchisee-respondents has dealings with a common franchisor (McDonald's USA) does not justify enmeshing them in one another's labor and employment disputes. To the contrary, this is precisely what our statute protects against. Section 8(b)(4)(B) protects neutral employers, including franchisees, from being embroiled in a dispute just because they do business with a common franchisor. See *Teamsters Local 456 (Carvel Corp.)*, 273 NLRB 516, 519–520 (1984) (Carvel ice-cream franchisee protected from coercion by union involved in labor dispute with Carvel, the franchisor, even though "mutual interdependence, necessary for the economic survival of both parties, is characteristic of franchise operations"). In short, the present consolidation assembles disparate claims and parties into a single massive proceeding based on alleged common elements that have yet to be proven and may never be proven. Necessarily, the litigation's structure, which is premised on what the General Counsel hopes to prove, will tend to emphasize those elements that each franchisee has in common with McDonald's USA, and it will tend to deemphasize evidence of differences, exceptions and explanations—presuming that each franchisee-respondent will have the resources needed to participate, with representation by counsel, in hearings to be held in multiple locations across the country that will likely take years to complete. Even at this early stage, there are signs that the unprecedented number of parties and claims in this consolidated proceeding is resulting in pressure to take procedural shortcuts that, cumulatively, will cause prejudice to the parties or at least detract from confidence in the integrity of the adjudication.[13] For example, the General Counsel has already argued that individual franchisee-respondents should be denied the right to separate representation by counsel of their own choosing. Even more troubling is the judge's failure to rule out the denial of this basic right if denying it "becomes necessary."[14]

Sixth, I disagree with suggestions that the mega-consolidation of parties and claims presented here is supported by existing case law, or that the resulting problems may be "ameliorated" through "case management" measures. It is true that no discovered Board case finds it is improper to consolidate 61 unfair labor practice charges filed in six NLRB Regions against 32 respondents alleging 181 violations at 30 different locations. However, there is an obvious explanation: a consolida-

[12] Obviously, the central theme that is alleged to connect all of the claims, respondents and affected employees in the instant proceeding is the General Counsel's theory that McDonald's USA exercises sufficient control to make it a "joint employer" of each franchisee-respondent's employees. However, in the analogous class-action context, the Supreme Court has emphasized that when deciding whether to certify a class under Rule 23 of the Federal Rules of Civil Procedure (which, unlike the Board's Rules, permits the aggregation of claims and claimants without separately adjudicating each violation), it is necessary to focus on more than the mere fact that everyone has the same employer: "Quite obviously, *the mere claim by employees of the same company* that they have suffered . . . [an] injury . . . *gives no cause to believe that all their claims can productively be litigated at once.* Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, supra, 131 S. Ct. at 2551 (emphasis added).

[13] For example, the Board has already been required to address the judge's denial of a request to have a transcript of a telephonic scheduling conference that, as described by the judge, was to address the "manner and time frame for the production . . . of documents and electronically stored information" subpoenaed by the General Counsel. *Lewis Foods of 42nd Street, LLC*, 362 NLRB No. 132 (2015). Likewise, one of the General Counsel's main arguments relates to a more expansive theory governing "joint employer" status about which the consolidated complaints are silent, and the Board denied McDonald's USA's motion for a bill of particulars. *McDonald's USA, LLC*, 362 NLRB No. 168 (2015).

[14] The judge's Case Management Order (dated March 3, 2015) states that the General Counsel requested that the judge "require parties to choose a lead or liaison counsel to act on behalf of other parties" and "require parties to file joint page-limited motions." Although the judge observed that these limitations would "circumscribe the prerogatives of the parties in terms of their choice of representative and the presentation of their positions," the Case Management Order states that "[s]uch limitations . . . will not be imposed unless it becomes necessary." Case Management Order, fn. 1.

tion of parties and claims on so colossal a scale has never been attempted before in a Board proceeding. Although the judge relies on cases involving Beverly Enterprises, where one consolidated proceeding involved 33 facilities in 12 states and another involved 17 facilities in 9 states,[15] the respondent there had *admitted* it was a "single employer at the time of the alleged violations" in one Board case, which the Board subsequently reaffirmed (in spite of Beverly's changed stance on this issue) in later cases. *Beverly California Corp*., 326 NLRB 232, 242 (1998). By comparison, the instant consolidation involves 32 respondents, including 30 franchisees, and McDonald's USA has *never* previously been found, under our statute, to be a "joint employer" of franchisee employees. For similar reasons, the judge's observation that "motions to sever consolidated cases have been granted by the Board only rarely" lacks persuasive force given that this immense consolidation has no parallel in the Board's history. It is unsurprising that no precedent exists regarding the inappropriateness of something that is unprecedented. The judge discounts the Board's statement that the General Counsel's discretion to consolidate cases is "not unbounded," *Cresleigh Management*, 324 NLRB at 774, by observing that *Cresleigh Management* suggests only two limitations to that discretion: (i) the General Counsel could not "relitigate the lawfulness of specific conduct in separate proceedings by asserting that the conduct violates separate sections of the Act," and (ii) failure to "include conduct encompassed by a pending charge in the complaint may bar a subsequent complaint concerning that conduct." Id. at 774–775 (citations omitted). Here as well, I believe the judge fails to recognize that the Board has never previously considered a proceeding like this one. Nothing in *Cresleigh Management* suggests that dozens of parties and claims, however unconnected, can be poured into a single consolidated proceeding without regard to the resulting costs, delays, and prejudice to every party and the imposition of substantial burdens on the Board itself and any reviewing court. Further, I disagree with the judge's suggestion, embraced by my colleagues, that particular problems rendering this consolidation inappropriate may be "ameliorated" by case management measures relating, for example, to (i) when evidence regarding a particular respondent will be presented, (ii) what notice would be required, (iii) whether respondents can expect to participate only in a subset of hearings without risk of being prejudiced by their absence from other hearing sessions and without providing input on or being aware of rulings made in their absence, and (iv) whether witnesses or respondents will be permitted to participate by videoconference. For one thing, this begs the question of whether consolidation is appropriate in the first place, which, if answered in the negative, renders immaterial the propriety of case management measures. Moreover, even the selective summary of case management issues described above demonstrates that many aspects of this litigation will deviate substantially from the Board's longstanding, well-established procedures. These departures, especially when considered cumulatively, increase the very substantial risk that any adjudicated outcome will be vulnerable to challenge on appeal, purely based on procedural grounds, putting aside whatever substantive legal determinations may also be appealed.

Finally, I believe my colleagues and the judge have not adequately considered the alternative of permitting these claims to be litigated in a more conventional and efficient manner. The Board is charged with the responsibility to adjudicate alleged unfair labor practices, and the agency has immense experience addressing individual cases involving alleged violations like those presented here. Indeed, the consolidated charges have already been investigated by six different NLRB Regions, and the General Counsel has attorney-representatives in each Region who could pursue much more manageable, conventional cases against each separate respondent. I respectfully disagree with the judge's premise that, in separate cases, the joint-employer issue "would require the presentation of the same evidence of widely applicable agreements, policies and practices, and the relitigation of the same issue, over and over again, resulting in possibly inconsistent determinations." As noted previously, the evidence regarding joint-employer status predictably will not be the "same" across the separate respondents, and assuming it will be fails to take into account the likelihood that evidence will be introduced regarding differences, exceptions and explanations specific to each workplace and each respondent. Moreover, it is obvious that the 181 alleged unfair labor practices will *not* involve "the relitigation of the same issue, over and over again." Although the judge reasons that separate proceedings before different judges might produce "inconsistent determinations," she fails to take into account several other considerations, which favor having each respondent's case decided separately:

(a) separate proceedings before different judges would greatly accelerate the resolution of each case;

(b) separate proceedings would result in a more efficient allocation of work among the judges presiding over those proceedings;

[15] *Beverly California Corp*., 326 NLRB 232, 242 (1998) (discussing *Beverly California Corp.*, 310 NLRB 222 (1993)), and *Beverly California Corp*., 326 NLRB 153 (1998).

(c) any different "determinations" may be attributable to factual differences between and among cases, with greater certainty that the details of each case would not be lost in a gargantuan record;

(d) any "inconsistent determinations" could be addressed by the Board, to the extent exceptions were filed from a judge's decision in one or more cases, and the availability of independent determinations by different judges, based on separate, manageable records, would facilitate the Board's review;

(e) hearings in different cases would likely be held at different times, in part as a result of accommodating scheduling issues involving the only party, McDonald's USA, that would be a participant in every individual case, which would also make it easier to manage the agency resources devoted to these claims; and

(f) on exceptions, the Board could independently consider whether two or more cases warrant consolidation for purposes of Board review, which would involve few or none of the costs, delays and potential prejudice associated with consolidation of diverse parties and claims at the hearing stage.

For the above reasons, I believe the Board should grant the motions to sever. In my view, the pursuit of the pending allegations against such disparate parties in a single consolidated proceeding—destined to be the most massive litigation in the Board's 80-year history—will cause enormously greater costs and delays than handling these matters in a more conventional manner, resulting in prejudice to the parties, overwhelming burdens on the Board and any reviewing court(s), with a risk of reversal on appeal based on the denial of due process to the respondents. Most importantly, the aggregation of 181 separate alleged violations will inevitably cause years of additional delay before affected employees will benefit from any Board-ordered remedies, in comparison to the relative speed with which the Board could address the same claims if they were adjudicated in separate proceedings.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. January 8, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX: Cases, Franchisee-Respondents, and Allegations Consolidated in the *Lewis Foods* Proceeding

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
02–CA–093893 02–CA–098662	Lewis Foods of 42nd Street, LLC	220 W. 42nd Street New York, NY	8(a)(1): solicited employee complaints and grievances, thereby promising employees increased benefits and improved terms and conditions of employment; promised employees that terms and conditions would improve; ceased posting employees' work schedules; removed employee name tags; threatened employees with unspecified reprisals; threatened employees with discharge; created the impression of surveillance 8(a)(3) and (1): imposing more onerous and rigorous terms and conditions of employment on an employee	Employee 1[16]
02–CA–093895 02–CA–097827	AJD, Inc.	1188 Sixth Avenue New York, NY	8(a)(1): interrogation; surveillance; creation of the impression of surveillance; threats to more strictly enforce rules 8(a)(3) and (1): suspension of an employee	Employee 2
02–CA–093927 02–CA–098659	John C Food Corp.	280 Madison Avenue New York, NY	8(a)(1): threats to discharge employees; threats to reduce hours of work; promise of unspecified improvements in terms and conditions of employment	None
02–CA–094224 02–CA–098676	18884 Food Corp.	1651 Broadway New York, NY	8(a)(1): threatened to discharge employees; solicited employee complaints and grievances, thereby promising increased benefits and improved terms and conditions of employment; promised employees a raise; ceased posting work schedules	None

[16] Again, I have substituted "Employee 1," "Employee 2," and so forth in place of the employees' real names consistent with the Agency's policy of not publicly disclosing the names of alleged discriminatees prior to the unfair labor practice hearing. See fn. 8, supra.

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
02–CA–094679 02–CA–098604	14 E 47th Street LLC	14 E 47th Street New York, NY	8(a)(1): interrogation; threats of unspecified reprisals	None
02–CA–097305	840 Atlantic Ave., LLC	840 Atlantic Avenue Brooklyn, NY	8(a)(1): threats to discharge employees; threats of unspecified reprisals; interrogation; instructing employees to refrain from engaging in union activities; surveillance of employees; creating an impression of surveillance	None
02–CA–103771 02–CA–112282	1531 Fulton St., LLC	1531 Fulton Street Brooklyn, NY	8(a)(1): instructing employees to stop talking about the union; instructing employees to stop talking with union organizers; telling employees they were prohibited from engaging in union activities and talking with coworkers about union activities; asking employees to sign a document acknowledging that they were told, and that they understood, they were not to engage in union activities; threatening employees with discharge; threatening employees with unspecified reprisals 8(a)(3) and (1): issuing a written reprimand to an employee; discharging an employee	Employee 3 Employee 4
02–CA–098009	McConner Street Holding, LLC	2142 Third Avenue New York, NY	8(a)(1): interrogation; soliciting employee complaints and grievances, thereby promising increased benefits and improved terms and conditions of employment	None
02–CA–103384	McConner Street Holding, LLC	2049 Broadway New York, NY	8(a)(1): interrogation; threats of unspecified reprisals	None

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
02–CA–103726	Mic-Eastchester, LLC	341 5th Avenue New York, NY	8(a)(1): telling employees they were prohibited from talking with the union after working hours	None
02–CA–106094	Bruce C. Limited Partnership	4259 Broadway New York, NY	8(a)(1): threatened employees with closure of the restaurant; threatened employees with reduced work hours; ceased posting employees' work schedules; told employees they were prohibited from accepting literature from union representatives	None

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
04–CA–125567 04–CA–129783 04–CA–133621	Jo-Dan Madalisse LTD, LLC	3137 N. Broad Street Philadelphia, PA	8(a)(1): maintaining no-loitering and no-solicitation rules; interrogating employees; soliciting an employee's complaints and grievances, thereby promising improved terms and conditions of employment; indicating that it would be futile for employees to seek union representation; offering to help an employee make career advances and/or receive promotions if the employee ceased supporting the union; creating an impression of surveillance; prohibiting an employee from speaking about the union at the restaurant; blaming the employee for costing Respondents money to combat the union; pretending to choke the employee to dissuade the employee from seeking union representation; telling a union organizer, in the presence of an off-duty employee, that the organizer was not permitted to solicit in the restaurant; instructing the off-duty employee not to sit with the organizer 8(a)(3) and (1): discharging an employee	Employee 5

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
13–CA–106490	Karavites Restaurants 11102, LLC	201 N. Clark St. Chicago, IL	8(a)(1): prohibited employees from signing anything given to them by the union; threatened employees with termination; threatened to cause the arrest of employees engaging in union activity; solicited employee complaints and grievances; promised employees increased benefits and improved terms and conditions of employment; promised employees resolutions to unspecified grievances; engaged in surveillance of employees engaged in concerted activities; promulgated and/or maintained various rules 8(a)(3) and (1): reducing employees' work hours; changing employee's job duties; imposing more onerous and rigorous terms and conditions of employment on employee	Employee 6 Employee 7
13–CA–106491	Karavites Restaurants 26, Inc.	10 E. Chicago, Ave. Chicago, IL	8(a)(1): threatened employees with termination; accused employees of harassment because they engaged in union activity; insisted that employees promise not to engage in union activity within the Respondent's facility; solicited employee complaints and grievances, implicitly promising to remedy those grievances; promulgated and maintained rules prohibiting employees from soliciting inside the store and prohibiting employees from conducting union activities during work or at the Respondent's facility; promulgated and maintained a confidentiality rule 8(a)(3) and (1): reduced the hours of work of an employee	Employee 8 ("John Smith")

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
13–CA–106493	RMC Loop Enterprises, LLC	23 S. Clark St. Chicago, IL	8(a)(1): threatened employees with unspecified reprisals and termination; made employees promise to refrain from engaging in union activity; asked employees to refrain from engaging in union activity; promised employees a wage increase; maintained various rules	None
13–CA–107668 13–CA–113837	Wright Management, Inc.	600 North Clark Street Chicago, IL	8(a)(1): threatened employees with suspension; disciplined employees; denied employee's request to switch shifts	Employee 9 Employee 10
13–CA–115647 13–CA–119015 13–CA–123916 13–CA–124813 13–CA–131440	V. Ovideo, Inc.	2707 N. Milwaukee Avenue Chicago, IL	8(a)(1): instructed employees not to engage in union or protected concerted activity; promulgated and maintained a confidentiality rule; instructed employees not to accept or receive materials from the union; informed employees that engaging in protected activity would impact the number of hours the Respondent assigned to employees; impliedly threatened to rescind meal benefits; reduced an employee's working hours; issued written warnings to employees; promulgated and maintained an overly broad work rule by issuing written warnings to employees	Employee 11
13–CA–118690	Lofton & Lofton Management V, Inc.	23 N. Western Ave. Chicago, IL	8(a)(1): promulgated a confidentiality rule	None

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
13–CA–123699 13–CA–129771	K Mark Enterprises, LLC	70 E. Garfield Blvd. Chicago, IL	8(a)(1): promulgated and maintained a confidentiality rule; interrogated an employee; threatened to terminate an employee; solicited grievances from an employee and implicitly promised to remedy those grievances; issued an employee a final written warning; disciplined an employee by ordering him to clock out and go home early	Employee 12
13–CA–124213	Nornat, Inc.	9211 S. Commercial Avenue Chicago, IL	8(a)(1): making a video recording of employees engaged in protected concerted activities; implying that it would be futile for employees to select the union as their bargaining representative	None
13–CA–124812	Karavites Restaurant 5895, Inc.	1004 West Wilson Chicago, IL	8(a)(1): promulgated and maintained a confidentiality rule	None
13–CA–129709	Taylor and Malone Management, Inc.	29 E. 87th Street Chicago, IL	8(a)(1): threatened employees with discipline and/or termination; promulgated and maintained a confidentiality rule; promulgated and maintained a nondisclosure rule; instructed employees to call management to report their anticipated participation in union and/or protected concerted demonstrations in order to avoid discipline for a no-call, no-show absence; instructed employees not to post strike activity on Facebook 8(a)(3): issued a no-call, no-show employee action form to an employee	Employee 13
13–CA–131141	RMC Enterprises, LLC	4047 E. 106th Street Chicago, IL	8(a)(1): promulgated a confidentiality rule	None

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
13–CA–131143	Karavites Restaurant 6676, LLC	600 N. Clark Street Chicago, IL	8(a)(1): promulgated a confidentiality rule	None
13–CA–131145	Topaz Management, Inc.	5220 S. Lake Park Ave. Chicago, IL	8(a)(1): promulgated a confidentiality rule	None
20–CA–132103 20–CA–135947 20–CA–135979 20–CA–137264	MAZT, Inc.	8940 Pocket Road Sacramento, CA	8(a)(1): interrogated employees; impliedly promised employees a wage increase; prohibited off-duty employees from accessing the customer area and parking lot; promulgated and maintained a rule prohibiting employees from talking about the union while at work while permitting employees to talk about other non-work related subjects; maintained a confidentiality policy 8(a)(3) and (1): suspended, placed on a leave of absence, and discharged an employee	Employee 14
25–CA–114819 25–CA–114915 25–CA–130734 25–CA–130746	Faith Corporation of Indianapolis	1611 North Meridian Street Indianapolis, IN	8(a)(1): threatened employees with unspecified reprisals, physical violence, and legal action; disparaged employees; interrogated employees; engaged in surveillance of employees; intimidated employees; encouraged employees to transfer to another restaurant 8(a)(3) and (1): reduced the work hours of an employee	Employee 15

Case No.	Respondent Franchisee	Restaurant Location of Alleged Violation(s)	Nature of Complaint Allegation(s)	Alleged Discriminatees
31–CA–127447 31–CA–130085 31–CA–130090 31–CA–132489 31–CA–135529 31–CA–135590	D. Bailey Management Co, Inc.	1071 W. Martin Luther King Blvd. Los Angeles, CA	8(a)(1): maintaining various rules; conveying to an employee that he or she was not allowed to discuss discipline with co-workers; disciplining an employee	Employee 16
31–CA–128483 31–CA–129027 31–CA–133117	Sanders-Clark & Co., Inc.	2838 Crenshaw Blvd. Los Angeles, CA	8(a)(1): impliedly threatened an employee with unspecified discipline; told employees they were not allowed to talk about the union on company property; interrogated an employee; threatened an employee with unspecified reprisals	None
31–CA–129982 31–CA–134237	2 Mangas Inc.	4292 Crenshaw Blvd. Los Angeles, CA	8(a)(1): interrogated employees; created the impression that employees' union activities were under surveillance	None

ORDER DENYING RESPONDENTS' MOTIONS TO SEVER

On December 19, 2014, the Regional Directors for Regions 2, 4, 13, 20, 25, and 31 issued six separate complaints alleging that McDonald's USA, LLC ("McDonald's") constitutes a joint employer with the individual franchisee Respondents operating within the particular Region's geographic area. The complaints further alleged that McDonald's and the franchisee Respondents, as joint employers, committed violations of Sections 8(a)(1) and (3) of the Act in response to the protected concerted and union activities of employees at the franchisees' locations. By orders dated January 5 and 6, 2015, Counsel for the General Counsel ("General Counsel") transferred and consolidated those complaints into the case captioned above, pursuant to Section 102.33 of the NLRB Rules and Regulations.

On January 15, 2015, McDonald's filed a Motion to Sever the cases comprising the above matter, and in late January and early February 2015, the franchisee Respondents filed Motions to Sever as well. General Counsel subsequently filed Oppositions, as did the Charging Parties. McDonald's and the franchisee Respondents also filed Replies.

McDonald's and the franchisee Respondents argue that the General Counsel abused his discretion in consolidating the cases based solely upon their alleged joint employer relationship. McDonald's and the franchisees further contend that the practical difficulties in hearing a case involving so many parties in different locations will make efficient and effective adjudication impossible. Finally, McDonald's and the franchisees argue that consolidation of the cases violates the parties' due process rights. Respondents take the position that each franchise should be the subject of a separate case and hearing, except for franchises commonly owned and operated.

General Counsel contends that consolidation of the cases did not constitute an arbitrary abuse of discretion. General Counsel states that he intends to present evidence establishing that McDonald's, through its agreements and other policies and practices applicable to all of the franchisee Respondents, constitutes a joint employer with its franchisees of the franchisees' employees. General Counsel further states that it will present evidence demonstrating that McDonald's effected a "nationwide, coordinated response" to the protected concerted and union activities of the employees. General Counsel argues that given the commonality of the evidence he intends to present, conducting the cases as separate proceedings would in fact be more onerous to the Respondents, the Charging Parties, the attorneys and witnesses, and the Judges Division.

The Charging Parties disavow McDonald's contention that consolidation violates their due process rights. The Charging Parties further argue that consolidation of the cases allows for a more efficient hearing process overall.

Section 102.33 of the Board's Rules and Regulations provides that General Counsel may transfer and/or consolidate charges and proceedings whenever he or she "deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay." As the Board has noted, this standard is articulated in the disjunctive. *Beverly California Corp.,* 326 NLRB 232, 236–237 (1998), enf'd. in part 227 F.3d 817 (7th Cir. 2000). The Board has stated that this provision "affords the General Counsel wide discretion," and that the General Counsel's decisions with respect to consolidation are "subject to review only for arbitrary abuse of discretion." *Service Employees Local 87 (Cresleigh Management),* 324 NLRB 774 (1997), citing *Teamsters (Overnite Transportation Co.),* 130 NLRB 1020, 1022 (1961). In *Service Employees Local 87 (Cresleigh Management),* the Board described the General Counsel's authority regarding consolidation by stating that, "the General Counsel may do as he thinks best."[1] 324 NLRB at 774.

Despite the broad "prosecutorial" discretion afforded to the General Counsel with respect to consolidation and transfer, Section 102.35(a)(8) of the Board's Rules and Regulations also empowers Administrative Law Judges to "order proceedings consolidated or severed" before a decision is issued. In order to determine whether consolidation or severance is appropriate, the ALJ should consider issues such as "the risk that matters litigated in the first proceeding will have to be relitigated in the second and the likelihood of delay if consolidation, or severance, is granted." *Service Employees Local 87 (Cresleigh Management),* 324 NLRB at 775–776.

General Counsel correctly argues that motions to sever consolidated cases have been granted by the Board only rarely. In *Banner Yarn Dyeing,* [135] NLRB 298, 298–299 (1962), the Board granted a motion to sever prior to the inception of the hearing, where the sole basis for consolidation was each Respondent's separate collective bargaining agreement with the same local union. Otherwise, the Respondents were businesses operating in entirely different industries, and the complaint did not allege any common relationship between the Respondents' purported violations or concerted action among them. Id. The other cases cited by Respondents in support of a more circumscribed standard for General Counsel's authority with respect to consolidation and severance are not persuasive. Most involve motions to reopen an already completed record, or an attempt to consolidate cases already pending before the Board on exceptions after an ALJ's decision had issued.[2] Thus, the arbitrary

[1] Respondents point out that in *Service Employees Local 87 (Cresleigh Management),* the Board stated that the General Counsel's discretion under Section 102.33 is "not unbounded." 324 NLRB at 774. However, in that case the Board identified two principles restricting the General Counsel's authority—General Counsel may not "relitigate the lawfulness of specific conduct in separate proceedings by asserting that the conduct violates separate sections of the Act," and failure to "include conduct encompassed by a pending charge in the complaint may bar a subsequent complaint concerning that conduct." *Service Employees Local 87 (Cresleigh Management),* 324 NLRB at 774–775, citing *Peyton Packing Co*., 129 NLRB 1358 (1961), and *Jefferson Chemical Co.*, 200 NLRB 992 (1972).

[2] *United States Postal Service,* 263 NLRB 357, 366–367 (1982) (motion to reopen the record); *Dow Chemical Co.,* 250 NLRB 748, fn. 1(1980) (motion to consolidate after ALJ decision had issued); *King Broadcasting Co.,* 324 NLRB 332, 339, fn. 12 (1997) (motion to reopen the record and consolidate after close of hearing); *Accent Maintenance Corp.,* 303 NLRB 294, 295, fn. 1, 299–300 (1991) (denying motion to reopen the record and consolidate given differing facts and priority of allegations then ripe for decision); *Venture Packaging,* 290 NLRB 1237, fn. 1, 1238 (1988) (General Counsel sought to consolidate

abuse of discretion standard articulated in *Service Employees Local 87 (Cresleigh Management)* is the operative criterion here.

The General Counsel's consolidation of the instant cases did not constitute an arbitrary abuse of discretion. General Counsel states that he will be introducing evidence to demonstrate that McDonald's is a joint employer with the franchisee Respondents consisting of agreements, policies, and business practices which apply throughout the country.[3] General Counsel further states that he will be introducing evidence to establish that McDonald's organized and directed a nationwide effort in response to the protected concerted and union activities of the employees at the franchisee Respondents' locations. Given the overarching nature of the General Counsel's theories here, and of the evidence which General Counsel intends to present, consolidation of the instant cases does not constitute an arbitrary abuse of discretion.

that in the past the General Counsel has consolidated cases across Regions in order to comprehensively and efficiently litigate allegations common to multiple iterations of a business. For example, in a series of cases involving facilities operated by Beverly Enterprises, General Counsel consolidated cases involving 33 facilities in 12 states into one proceeding, and involving 17 facilities at 9 states in a later action, transferring cases from other Regions as necessary. *Beverly California Corp.,* 326 NLRB at 237, discussing *Beverly California Corp.,* 310 NLRB 222 (1993), and *Beverly California Corp.,* 326 NLRB 153 (1998). The *Beverly California Corp.* series of cases also involved contested allegations regarding the status of separate entities, with General Counsel contending that Respondent's central corporate headquarters, its operating divisions, and each of its individual facilities constituted a single employer. *Beverly California Corp.,* 326 NLRB at 242. While characterizing General Counsel's pre-hearing consolidation and transfer of cases in the third proceeding as "unprecedented . . . given the number of cases and the breadth of the geographic area in which they arose," the Board found that it was ultimately within the scope of General Counsel's authority under Section 102.33.[4] *Beverly California Corp.,* 326 NLRB at 236–237.

Respondents also contend that hearing the cases as currently consolidated will deny them due process, result in prejudice, and engender an inefficient hearing process. However, such concerns can be ameliorated to the extent that they do not establish that General Counsel has arbitrarily abused his discretion. The most salient of Respondents' objections in this regard involves the presentation of evidence pertaining to the alleged joint employer relationship in a location that would ostensibly require travel in order for all of the franchisee Respondents which seek to cross-examine the relevant witnesses to fully participate.[5] However, in that event General Counsel would provide adequate notice that evidence pertinent to joint employer status would be presented, and could make arrangements for franchisee counsel and parties in a distant location to participate by videoconference at one of the Board's Regional offices.[6] Other logistical issues involving, for example, the production of documents pursuant to subpoena or the presentation of evidence can be resolved through case management and the cooperation of the parties. Overall, whatever difficulties are posed by hearing the cases as currently consolidated are ultimately less likely to result in delay and inefficiency than the approximately 25 separate proceedings implicating the identical issue of joint employer status being proposed by Respondents. The latter course would require the presentation of the same evidence of widely applicable agreements, policies and practices, and the relitigation of the same issue, over and over again, resulting in possibly inconsistent determinations. Issues of prejudice and confusion are not so critical in a context where the finder of fact is a judge as opposed to a jury.[7] And the sheer size of the record likely to be produced is not ultimately pertinent to the legal standards governing a motion to sever or the General Counsel's authority to consolidate cases.

Finally, Respondents contend that General Counsel's consol-

several cases already pending before the Board, with no party objecting). See also *Beverly California Corp.,* 326 NLRB at 237, fn. 19.

[3] The cases Respondents cite to argue that the joint employer issue is an insufficient common basis to justify consolidation under the arbitrary abuse of discretion standard are inapposite. See *Sentry Investigation Corp.,* 198 NLRB 1074, fn. 2 (1972) (motion to reopen the record in a representation case); *General Electric Co. (San Leandro, Cal.),* 123 NLRB 1193, 1193–1195 (1959) (denying union's motion to consolidate two cases involving representation petitions in the context of refusal to permit incumbent to amend certification after transfer of employees between facilities); *Glaziers and Glassworkers Local 767*, 228 NLRB 200, 202, fn. 5 (1977) (rejecting employer's motion to consolidate Section 10(k) proceeding with more recent Section 8(b)(4)(D) charge filed by another union given potential delay in resolving jurisdictional dispute).

[4] The cases consolidated in the third proceeding originated in the Board's Regional offices located in Boston, Pittsburgh, Cleveland, Atlanta, Winston-Salem, Tampa, St. Louis, New Orleans, Peoria, and Hartford, and were transferred to Region 6 in Pittsburgh when consolidated. 326 NLRB at 232. They encompassed 9 facilities in 6 states, and were then tried near the facility involved. *Beverly California Corp.,* 326 NLRB at 241.

[5] Again, the cases discussed by Respondents in order to argue that hearing the cases as currently consolidated would result in prejudice to them address areas of substantive law, evidentiary standards, and procedural situations irrelevant to the Board's processes and the instant case. *In re Repetitive Stress Injury Litigation,* 11 F.3d 368, 371, 373–374 (2d Cir. 1993) (evaluating "commonality of factual and legal issues" among consolidated products liability cases); *Malcolm v. National Gypsum Co*., 995 F.2d 346, 351–352 (2d Cir. 1993) (asbestos litigation with claims ultimately heard by a jury); *Arnold v. Eastern Air Lines, Inc.,* 712 F.2d 899 (4th Cir. 1983) (personal injury actions following airplane crash to [be] heard by a jury); *Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc.,* 878 F.2d 5, 8 (1st Cir. 1989) (consolidation required that one party forego contractually agreed-upon location for arbitration); *Garber v. Randell,* 477 F.2d 711 (2d Cir. 1973) (securities litigation).

[6] Because it is counsel who would be participating by videoconference, with the witnesses providing live testimony before me, there would be no detrimental impact on my opportunity to fully assess the witnesses' credibility.

[7] Two of the cases relied upon by Respondents specifically address potential prejudice and confusion where the case would be presented to a jury. See *Malcolm,* 995 F.2d at 352–353; *Arnold,* 712 F.2d at 906–907. Violations of Sections 8(a)(1) and (3) allegedly committed by the individual franchisees will of course be evaluated in the context of the specific evidence presented with respect to those issues.

idation of the cases here violates Section 101.10 of the Board's Rules and Regulations, which states that "Except in extraordinary situations" a hearing is "usually conducted in the Region where the charge originated." However, this provision clearly envisions both "ordinary" scenarios where the hearing is conducted in a different Region from the Region where the charge was filed, and "extraordinary" circumstances, such as those of *Beverly California Corp.* and the instant case, where holding the hearing in a different Region is appropriate. Respondents' arguments in this regard are therefore not persuasive.

For all of the foregoing reasons, General Counsel's consolidation of the above cases did not constitute an arbitrary abuse of discretion, and severance of the cases would not result in more efficient resolution of the issues raised by the Complaint's allegations. Respondents' Motions to Sever the cases are therefore denied.

Dated: New York, New York. February 20, 2015.
LAUREN ESPOSITO, Administrative Law Judge.